STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HOLLAND, JR.,

Defendant-Appellant.

UNPUBLISHED
January 13, 2009

No. 279870
Washtenaw Circuit Court
LC No. 06-000618-FC

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of kidnapping, MCL 750.349, one count of first-degree home invasion, MCL 750.110a(2), one count of armed robbery, MCL 750.529, and six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 56 to 80 years' imprisonment for each kidnapping, robbery, and CSC I conviction, and a consecutive term of 20 to 40 years' imprisonment for the home invasion conviction. He appeals as of right. We affirm.

During the evening of September 20, 2005, defendant entered the victim's apartment through a sliding glass door and put a belt around her neck. He asked for money and became angry when she only produced approximately one dollar. He forced the victim to engage in various sexual acts and, when the victim told him that she could get money from an automatic teller machine (ATM), he made the victim clean herself up and drove her at knifepoint to an ATM. The victim withdrew $100, which defendant took. Defendant forced the victim to drive to another ATM and then fled on foot. The victim returned to her apartment building, where she asked a neighbor for help and was taken to a hospital. The Washtenaw County Sheriff's Department began investigating the matter.

In January 2006, defendant was interviewed at the Washtenaw County Sheriff's Department as a witness in a 1991 homicide case. During the interview, defendant began discussing past conduct that he attributed to drug use. He admitted robbing and assaulting the victim in this case. He also admitted to a robbery at a tanning salon in which that victim also reported being sexually assaulted. Although neither victim identified defendant at trial or in a line-up, the victim in this case testified that she recognized defendant's voice in an audio recording of his interview that was played at trial. In addition, defendant's DNA profile matched

DNA found on a shirt that was wrapped around the victim's head during the sexual assault in her apartment.

First, defendant claims that the trial court erred when it admitted his tape-recorded confession. We disagree. Defendant had moved to suppress his confession in the trial court, which denied his request after a *Walker* hearing.[1]

"This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence." *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We examine the entire record and make an independent determination whether the confession was voluntary based on the totality of the circumstances. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). We review the trial court's findings of fact for clear error. *Id.* at 68. We review de novo issues of law, such as the application of a constitutional standard to uncontested facts. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). We defer to the trial court's determinations regarding the credibility of the witnesses at a *Walker* hearing. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We consider the following nonexhaustive list of factors in making this determination, although no one factor is dispositive:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

After reviewing the evidence presented at the hearing, we conclude that the trial court's findings of fact were not clearly erroneous, and the totality of the circumstances indicates that defendant's confessions on January 12 and 13, 2006, were voluntary. Defendant was 39 years old when he made his confession; he had some post-high school education and the interviewers noted that he was articulate. Defendant also had a record of other juvenile and adult convictions, indicating that he had experience with the criminal justice system. In particular, defendant indicated that he had been read his *Miranda* rights and understood them when he was a juvenile. Further, defendant was advised of his *Miranda* rights during a January 6, 2006, interview and

[1] *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2d 87 (1965).

requested an attorney, which halted the questioning. This earlier request indicates that defendant understood his rights and how to invoke them. The record also reflects that defendant was advised of his *Miranda* rights on several occasions throughout the interviews on January 12 and 13, 2006, and each time defendant indicated that he understood his rights and signed the waiver form. There was also no evidence of an unnecessary delay in bringing defendant before a magistrate, that defendant was injured, drugged, or intoxicated,[2] or that defendant was physically abused or threatened with physical abuse.[3]

We further defer to the trial court's finding that defendant was not suffering from ill health and did not inform the interviewers of any health problems. Instead, the evidence presented at the *Walker* hearing indicated that on January 6, 2006, the day after defendant turned himself in for a parole violation, he exhibited no symptoms of drug withdrawal. Further, defendant's interviewers testified that he did not exhibit symptoms of drug withdrawal during the interviews on January 12 and 13. In addition, no evidence indicates that defendant complained to the prison staff or the interviewers regarding any alleged ailments or that he requested or received medical treatment.

We also hold that the trial court's finding that defendant was not deprived of food or sleep was not clearly erroneous. The record reflects that defendant was provided food in the afternoon on January 12, 2006, and breakfast and lunch on January 13, 2006. Harold Raupp, the polygraph examiner, testified that defendant told him that he had eaten. Defendant also acknowledged that he was given food on January 13;[4] defendant cannot argue that he was deprived of food when he simply chose not to eat the food offered to him. Moreover, although defendant testified that he slept poorly or could not sleep in the holding cell at the Washtenaw County Jail, there was no evidence that the interviewers or the corrections officers purposely deprived him of sleep. In addition, although defendant might have been tired during the interview, the interviewers noted that he was nonetheless coherent, articulate, and indicated that he wanted to proceed with the interview. In fact, Raupp refused to administer the polygraph examination on the night of January 12 even though defendant wanted to continue, because Raupp believed that defendant was too tired and he wanted defendant to rest that night and come back the next day. The next day, defendant exhibited no signs of extreme sleep deprivation and indicated that he wanted to take the polygraph test.

We also find that the trial court did not clearly err in concluding that defendant was not subjected to several hours of coercive questioning. The record reflects that the interviewers originally planned to talk to defendant only regarding his role as a witness in an upcoming murder trial. Years earlier, defendant had told police that the suspected murderer, who was slated to go to trial in February of 2006, told defendant about the 1991 homicide. When the

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[2] In particular, defendant testified that he did not request or receive any illegal or legal drugs while in jail.

[3] Defendant's interviewers testified that defendant was not physically abused, and defendant did not refute these statements.

[4] Specifically, defendant testified that he was offered a hamburger on January 13, but was not hungry at the time.

police spoke with defendant in January 2006, however, he changed his story, indicating that he was actually present during the murder when the suspected murderer committed it. The police then wanted to give defendant a polygraph test to verify his statements. During defendant's interview with Raupp before the polygraph examination, defendant volunteered that he had "aces up his sleeve," and that he was the man "they were looking for." Defendant indicated "that he was going to lay it on the table. He was going to lay it all out." Defendant then revealed his participation in crimes about which Raupp had no previous knowledge, and Raupp attempted to redirect defendant's attention to his knowledge as a witness in the murder case. Raupp testified that defendant never answered questions in an automatic manner during these conversations and that he was articulate and eager to proceed.

Additionally, the record reflects that defendant was in jail since January 5, 2006, because of a parole violation, and he was interviewed on January 12 beginning late in the afternoon and ending at approximately 9:00 p.m. Raupp refused to administer the polygraph examination at 9:00 p.m. because defendant looked too tired. The polygraph test and interview on January 13 began at approximately 9:00 a.m. and lasted until approximately 11:00 a.m. or 12:00 p.m. Defendant was given breaks, food, and water. After carefully reviewing the testimony presented at the *Walker* hearing and the portions of defendant's tape-recorded statements played for the trial court, we conclude that the trial court did not clearly err in finding that defendant was not coerced into making a statement and that he was actually speaking in full sentences, explaining why he desired to confess. Based on the record evidence, we defer to the trial court's decision to credit the interviewers' testimony and the tape-recorded evidence over defendant's testimony and assertions that he was subjected to hours of coercive questioning. *Tierney, supra* at 708.

Defendant also argues that his request for counsel during an interview conducted on January 6, 2006, is sufficient reason, standing alone, to suppress his statements and confession on January 12 and 13. Once a defendant invokes his right to counsel during custodial interrogation, this request must be honored "*unless the accused himself initiates* further communication, exchanges or conversations with the police." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (emphasis in original). This rule also applies where the police subsequently attempt to question the defendant regarding a matter unrelated to the initial interrogation. *Arizona v Roberson*, 486 US 675, 687; 108 S Ct 2093; 100 L Ed 2d 704 (1988).

Regardless, the record reflects that defendant initiated the discussion about his involvement in the case at bar and that he was not being interrogated at the time he confessed. The interviewers only intended to ask defendant about his knowledge as a witness against the suspected murder in a homicide investigation. Raupp knew nothing about defendant's involvement in other crimes and he tried to redirect the conversation back to defendant's knowledge as a witness in the murder case. An "interrogation" is "express questioning and [] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). See also *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983) (no interrogation occurred where the police informed the defendant of the charge against him and why the police believed the defendant was responsible, because the police statements were not intended to elicit a response, but to provide information). The questions posed to defendant were directed toward his knowledge as a witness in a homicide investigation in which defendant was

not a suspect; these questions were not reasonably likely to elicit information about the case at bar.

Defendant also alleges that his confession is inadmissible because it was induced by a promise. We disagree. The existence of a promise is just one of the circumstances to consider in examining whether, under the totality of the circumstances, the statement was made voluntarily. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Raupp testified that defendant first introduced the topic of speaking with his family, although defendant claims that Raupp brought it up. We find no basis to upset the trial court's determination that Raupp's testimony was more credible on this issue. See *Tierney*, *supra* at 708. Considering that Raupp had no knowledge of defendant's other crimes before defendant told him, Raupp had no reason to promise defendant anything in order to obtain a confession. In fact, Raupp was unaware that there was even the possibility of obtaining a confession or confessions. In addition, Raupp did not have the authority to grant defendant's request to see his family. To the extent there was any promise, it was merely Raupp's promise to pass along defendant's request to see family to Raupp's supervisors. Accordingly, the record does not support a finding that defendant was induced or coerced into making the incriminating statements, and the trial court did not err in holding that defendant's incriminating statements were not improperly induced by a promise.

Next, defendant claims that he was denied his Sixth Amendment right to confront witnesses when the prosecutor's forensic DNA expert, Julie Kowaleski, was permitted to testify regarding the work of two colleagues, Julie Hutchinson and Kelly Lewis. Because defense counsel raised only a hearsay objection to Kowaleski's testimony with respect to Lewis's work and failed to object based on the Confrontation Clause or to raise any challenge to Kowaleski's testimony regarding Hutchinson's work, this issue is unpreserved, and we review defendant's claim for plain error affecting his substantial rights. *Carines*, *supra* at 763; *Bauder*, *supra* at 178; *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Under the Confrontation Clause, US Const, Am VI, an accused has a right to confront witnesses against him. *People v Jambor* (*On Remand*), 273 Mich App 477, 486; 729 NW2d 569 (2007). Testimonial hearsay statements are admissible only where the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although the United States Supreme Court has not adopted a comprehensive list of what is considered a "testimonial" statement, statements are "testimonial" in the context of police interrogation when the circumstances objectively indicate a primary purpose to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Prior testimony and pretrial statements that the declarant could reasonably expect would be used in a prosecutorial manner are also considered testimonial in nature. *Jambor*, *supra* at 487. When determining whether a forensic analyst's laboratory report is testimonial in nature, this Court may consider whether the report contains subjective statements or analytic opinions. See *id.* at 487-488 (fingerprint cards were admissible where they did not contain subjective statements).

This issue concerns Kowaleski's testimony regarding laboratory work done by two individuals. Kowaleski testified that regular STR and Y-STR analyses were conducted in this case. She indicated that, unlike a regular STR, Y-STR testing only targets male DNA, and she mentioned Hutchinson's regular STR testing to explain why she chose to conduct Y-STR testing.

We find no support in the record for defendant's claim that Hutchinson's work was critical to the prosecutor's case. There is no indication from Kowaleski's testimony that any regular STR testing linked defendant to the charges in this case. Regardless, because defendant had an opportunity to cross-examine Kowaleski regarding why she conducted Y-STR testing, we find no plain violation of defendant's right of confrontation. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

The more significant question is whether Kowaleski's testimony that she used a DNA profile obtained by her colleague, Kelly Lewis, from a buccal swab taken from defendant[5] to compare against the Y-STR profile that was obtained from a swab on the victim's shirt requires reversal. Kowaleski testified that she compared the two profiles and concluded that there was a match. On cross-examination, she clarified, "I can't say for sure that it's Mr. Holland because as I said before that a given male will have the same Y-STR profile as his father and his paternal grandfather." Because it is not plain from the record that Lewis conducted any subjective analysis in arriving at the DNA profile for defendant, we conclude that defendant has failed to show a plain violation of his right of confrontation.

Defendant's argument that Kowaleski's testimony violated MRE 703 is not properly before us because it is not set forth in the statement of the question presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nonetheless, it is plain from the record that the prosecutor failed to offer into evidence the specific data that Kowaleski used to form her opinion, even though Kowaleski testified that her opinion was based on information in a case file that she brought to court. MRE 703 requires that "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Further, to the extent that facts or data are based on hearsay as defined in MRE 801,[6] this evidence is inadmissible unless it fits into a hearsay exception recognized by the rules of evidence. MRE 802; *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

However, because there was no objection to Kowaleski's testimony based on MRE 703, defendant has the burden to show plain error affecting his substantial rights. *Jones*, *supra* at 355-356; *Carines*, *supra* at 763. Defendant has failed to establish this prejudice based on MRE 703. The claimed error did not affect defendant's substantial rights because defendant's confession established his identity as the individual who assaulted and robbed the victim. The victim's testimony that she recognized defendant's voice corroborated his confession. Further, defendant was linked to the area where the incident occurred through the testimony of a witness who lived in an apartment complex located near the victim's apartment complex. The witness testified that defendant visited her children's father at the apartment three or four times a week in 2005.

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[5] Detective Neumann testified that he obtained buccal swabs from defendant and sealed them according to departmental policy to protect their integrity. Lori Bruski, a forensic scientist employed by the Michigan State Police, testified that she authorized the additional Y-STR testing at the private forensic DNA lab where Kowaleski was employed.

[6] MRE 801 defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

In evaluating the issue of prejudice, we also find it significant that Kowaleski could not say with certainty that the DNA taken from the victim's shirt belonged to defendant. Although the DNA evidence might have provided additional support for the prosecutor's case, considering the strong evidence to establish defendant's identity without the DNA evidence, any alleged error based on MRE 703 did not affect the outcome of the trial. Therefore, reversal is not warranted.

Defendant also argues that the trial court erred by allowing the prosecutor to introduce evidence regarding the robbery and sexual assault at a tanning salon under MRE 404(b), because the victim in this case could not identify him and the prosecutor failed to establish that the offenses were committed as part of a common plan, scheme, or method. We disagree.

We review a trial court's decisions to admit evidence for an abuse of discretion, but decisions involving a preliminary question of law, such as whether a rule of evidence precludes admission, are reviewed de novo. *McDaniel*, *supra* at 412; *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"MRE 404(b) is a rule of inclusion, not exclusion." *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). The following safeguards are applicable to the admissibility of other-acts evidence:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision [sic] of this kind under Rule 403.'" [*People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993)], quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin* (*After Remand*), 463 Mich 43, 55-56; 614 NW2d 888 (2000).]

Here, the trial court considered the prosecutor's pretrial motion to admit other-acts evidence in conjunction with defendant's motion to have the jury presented with a redacted version of his recorded confession excluding his references to other inadmissible acts. The prosecutor agreed that the jury should not hear the entire confession. The prosecutor proposed to allow evidence that defendant committed similar acts in two other incidents to corroborate some of defendant's statements. The prosecutor argued that the evidence in each case was so similar that it would establish defendant's identity, but this evidence was also relevant to establish a common scheme, plan, and method, as well as an absence of mistake on the part of the victim with respect to what occurred. The parties conceded that none of the victims could identify defendant by face, but the prosecutor proposed that DNA evidence would establish defendant's identity independently of the confession.

The trial court allowed the evidence, finding that it was relevant to establish both identity and that defendant followed a common scheme with respect to each victim. At trial, however, the prosecutor only introduced other-acts evidence with respect to the robbery and sexual assault at the tanning salon in December 2005. Further, the only DNA evidence introduced at trial related to this case. Although the tanning salon victim testified regarding how the robbery and sexual assault were perpetrated, the prosecutor only offered defendant's confession to establish his identity as the assailant in this case. The trial court repeatedly instructed the jury with respect to the limited use of the evidence.[7]

Examined in this context, defendant has not shown any basis for reversal. The evidence was properly admitted to establish defendant's identity and to show that the offense was part of a common scheme. Under a modus operandi theory, a defendant's identity can be shown through the admission of evidence that the defendant committed similar acts and that a special quality of the acts established defendant as the perpetrator of both offenses. *People v Ho*, 231 Mich App 178, 186-187; 585 NW2d 357 (1998). A lesser degree of similarity between the charged act and other act is needed to show a common scheme used by a defendant in committing the charged act. *Sabin*, *supra* at 65-66. Evidence of similar conduct is logically relevant to show that the charged act occurred when it is sufficiently similar to the other act to support an inference that they are manifestations of a common scheme. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

There are sufficient common features between this case and the incident at the tanning salon to infer that defendant used a common scheme to rob and sexually assault the victims. Therefore, we are not persuaded that the trial court abused its discretion in admitting the evidence. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

Regardless, considering that the same confession was used to identify defendant as the person who committed the robbery and sexual assault at the tanning salon and who committed the offense in this case, any error in admitting the evidence was harmless. At most, the evidence tended to show that defendant admitted to being the perpetrator in two instances that, according

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[7] In the instructions given by the court before deliberations, the jury was told:

> You may only think about whether this evidence tends to show that the defendant had a reason to commit the crime, that the defendant acted purposefully. That is, not by accident or mistake or because he misjudged the situation. That the defendant used a plan, system or characteristic scheme that he has used before or since and who committed the crime that the defendant is charged with.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

to the victims' descriptions of the offenses in their trial testimony, had common features. It does not affirmatively appear more probable than not that the outcome of the trial would have been different if the evidence concerning the incident at the tanning salon had not been introduced. *Lukity*, *supra* at 495-496.

Next, we consider defendant's claim that his counsel was ineffective. Because defendant did not move for a new trial or a *Ginther*[8] hearing on this ground, we limit our review to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Defendant has the burden of establishing that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

We reject defendant's claim that his counsel was ineffective for failing to call a DNA expert. "[T]he failure to call witnesses only constitutes ineffective assistance if it deprives a defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant's speculation regarding the possible use of a defense expert is insufficient to show that he was deprived of a substantial defense. The record does not indicate the nature of defense counsel's investigation following the trial court's March 14, 2007, pretrial ruling authorizing funds for a DNA expert, and there is no other basis for concluding that defendant was deprived of a substantial defense. Therefore, defendant's claim of ineffective assistance on this ground cannot succeed. "[T]he defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, *supra* at 600.

Further, defense counsel's failure to challenge Kowaleski's testimony based on the Confrontation Clause or MRE 703 does not merit relief. As previously indicated, the DNA evidence presented through Kowaleski's testimony did not affect the outcome of the case. Because there is no reasonable probability that, but for counsel's alleged error, the result of the trial would have been different, defendant's claim of ineffective assistance cannot succeed on this ground. *Carbin*, *supra* at 600.

Finally, we agree with defendant that Detective Nuemann gave an unresponsive answer when defense counsel asked him whether a photograph of defendant showed any distinguishing marks or tattoos, and he responded by explaining that a "red rum" tattoo depicted in the photograph is "typically murder backwards." A police witness has a special obligation not to venture into forbidden areas that may prejudice the defense. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). A cautionary instruction is an appropriate means of removing the taint, if any, attributable to unresponsive testimony. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Here, however, Detective Nuemann's response was brief. Further, by not requesting a cautionary instruction, defense counsel avoided highlighting what the jury itself could have potentially seen by looking at the photograph of defendant taken in January 2006. Instead, the record reflects that defense counsel continued by asking Detective Nuemann to comment on

[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

whether he would say that this photograph depicted a large tattoo. Although the victim later testified that she did not have an opportunity to see if defendant had the tattoo on his body during the sexual assault, she had earlier indicated that defendant took off his jersey at one point. Defense counsel used the tattoo evidence during his closing argument to question defendant's identity as the assailant. He remarked, "You'll get a chance to see this picture of my client, the color version and the black and white version, I think you'll admit—you'll have to agree that this tattoo on his stomach is probably the size of a small billboard."

A defendant claiming ineffective assistance of counsel "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, *supra* at 600. Defendant has not met his burden to show that his counsel's failure to move to strike Neumann's brief remark or to seek a cautionary instruction constituted unsound trial strategy. We are not persuaded that trial court's performance was deficient or prejudiced defendant.

Finally, defendant argues that his consecutive sentences of 56 to 80 years' imprisonment for his kidnapping, armed robbery, and CSC I convictions are invalid because they exceed his life expectancy. Because defendant did not raise this issue before the trial court at sentencing or in a proper post-sentencing motion, MCR 6.429(C), we limit our review to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; see also *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

As a third habitual offender, defendant was subject to a sentence of life imprisonment or a lesser term for each conviction. MCL 769.11(1)(b). As a matter of law, the Legislature's authorization of a sentence of life or any term of years does not require that the sentencing judge tailor the sentence to the person's age. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). Therefore, defendant has failed to demonstrate any sentencing error.[9]

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis

[9] At oral argument, defendant's attorney, with the prosecutor's permission, made an oral motion to remand this case to the lower court to conduct a *Ginther* hearing. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). After accepting and considering this oral motion and reviewing the lower court record, we deny defendant's motion to remand for a *Ginther* hearing.